

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DAVID A. HICKS AND JOAN V. HICKS	:	DETERMINATION
for Redetermination of a Deficiency or for	:	DTA NO. 814786
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1987 and 1988.	:	

Petitioners, David A. Hicks and Joan V. Hicks, 345 Middle Line Road, Ballston Spa, New York 12020, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1987 and 1988.

The Division of Taxation, by its representative Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel), brought a motion dated May 21, 1996 seeking summary determination in the above-referenced matter. Petitioners David A. Hicks and Joan V. Hicks, appearing pro se, filed a letter in response to the Division's motion on May 30, 1996. Accordingly, the 90-day period for the issuance of this determination under section 3000.5(d) of the Rules of Practice and Procedure of the Tax Appeals Tribunal began on May 30, 1996. Based upon the motion papers, the affidavits submitted therewith and all pleadings and documents submitted, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' claims for refund of tax paid on Federal pension income as untimely pursuant to Tax Law § 687(a) where such claims were filed beyond the statutory period of limitations but where New York's taxation of Federal pension income was ultimately determined unconstitutional under the rule of Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891).

FINDINGS OF FACT

1. Petitioners, David A. Hicks and Joan V. Hicks, filed their joint 1987 New York State personal income tax return on or before April 15, 1988. Petitioners also timely filed their joint 1988 New York State personal income tax return on or before April 15, 1989. On each such return petitioners included Federal pension income as part of their total New York adjusted gross income.

2. Pursuant to separate claims dated October 11, 1994 and filed with the Division of Taxation ("Division"), petitioners sought refunds of New York State income tax paid on their Federal pension income for the years 1987 and 1988.

3. By a Notice of Disallowance dated December 27, 1994, the Division denied petitioners' refund claims as untimely filed.

4. Neither of the refund claims filed by petitioners in respect of the years at issue was filed within three years of the date of filing of petitioners' New York returns for those years.

5. Previously, in 1989, petitioners filed a claim for refund of New York income tax paid on Federal pension income for the year 1985. This claim was denied pursuant to a Notice of Disallowance dated November 20, 1989, which referred to the decision of the Supreme Court in Davis v. Michigan Dept. of Treasury, *supra*, and noted that said decision did not address the issue of the retroactive application of its holding. The Notice of Disallowance further noted that New York law regarding the taxation of Federal pension benefits had been changed effective January 1, 1989 and also stated that petitioners' 1985 claim had been disallowed because "New York State will not issue refunds for taxes paid on federal pension benefits for years prior to 1989." The Notice of Disallowance concluded by advising petitioners of their appeal rights and stated that "[i]f pending court action during the two year [appeal] period changes this decision your claim(s) will be automatically reconsidered."

CONCLUSIONS OF LAW

A. On March 28, 1989, the United States Supreme Court issued Davis v. Michigan Dept. of Treasury (supra). Davis held that state income tax schemes which provide for inconsistent treatment of state and Federal retirement benefits violate 4 USC § 111, which protects Federal employees from discriminatory state taxation, and further held that such schemes are unconstitutional under the doctrine of intergovernmental tax immunity.

B. At the time of the issuance of Davis, the Tax Law provided for similarly discriminatory treatment of Federal and State retirement benefits. Specifically, Tax Law former § 612(c)(3) provided that pensions to officers and employees of New York State and its political subdivisions were excluded from New York State income tax. At the same time, the Tax Law contained no similar provision for pensions to Federal retirees; such pensions were therefore subject to tax. In an apparent effort to remedy this situation, the Legislature amended the Tax Law, effective January 1, 1989, to exclude Federal pensions from New York income tax (see, L 1989, ch 664; Tax Law § 612[c][3][ii]) and thereby place both State and Federal retirees on equal footing. This remedy, however, was explicitly prospective and the Davis decision did not address the issue of retroactive application of its holding. At the time, the Division of Taxation took the position that Davis applied prospectively only and therefore denied refunds of tax on Federal pensions for years prior to 1989 even where timely refund claims were filed. Not surprisingly, Federal pensioners disagreed and commenced litigation (see, Duffy v. Wetzler 148 Misc 2d 459, 555 NYS2d 543, mod 174 AD2d 253, 579 NYS2d 684, appeal dismissed 80 NY2d 890, 587 NYS2d 900, revd 509 US 917, 125 L Ed 2d 716, on remand 207 AD2d 375, 616 NYS2d 48, lv denied 84 NY2d 838, 617 NYS2d 129, cert denied ___US___, 130 L Ed 2d 673).

C. The issue of the retroactive application of the Davis holding was resolved in the affirmative in 1993 in Harper v. Virginia Dept. of Taxation (509 US 86, 125 L Ed 2d 74). In that case, while the Court held that the rule announced in Davis was to be given full retroactive effect, it did not provide relief to the petitioners therein. Rather, citing McKesson Corp. v.

Division of Alcoholic Beverages & Tobacco (496 US 18, 110 L Ed 2d 17), the Court held that a state was free to choose the form of remedy it would provide to rectify any unconstitutional deprivation, but that such a remedy must satisfy the demands of Federal due process (id., 125 L Ed 2d at 88, 89). In this context, Federal due process requires that where taxes are paid pursuant to a scheme ultimately found unconstitutional, the state must provide taxpayers with "meaningful retrospective relief" from taxes, meaning that in refund actions the state must afford taxpayers a "fair" opportunity to challenge the accuracy and legal validity of the tax and a clear and certain remedy for any erroneous or unlawful tax collection (see, McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra, 496 US at 39, 110 L Ed 2d at 37, 38).

D. Harper thus requires that Davis be given retroactive application. Accordingly, applying Davis to the instant matter, it is clear that petitioners "overpaid" their income tax during the years at issue within the meaning of Tax Law § 687(a) (see, Fiduciary Trust Co. v. State Tax Commn., 120 AD2d 848, 502 NYS2d 119, 120).

E. Tax Law § 687(a) controls refunds of overpayments of income tax in New York and provides, in relevant part, as follows:

"Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later."

F. The dispute in the instant matter involves the time limitations portion of Tax Law § 687(a). Pursuant to this section, petitioners were required to file refund claims within three years from the date of filing of their returns for the years at issue. Petitioners failed to do so. Accordingly, the question presented is whether the limitations period set forth in Tax Law § 687(a), as applied in this instance, complies with Federal due process requirements under the standard enunciated in McKesson.

G. In McKesson, the Court discussed various constitutionally permissible procedural requirements available to a state to protect its interest in maintaining fiscal stability:

"The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such actions, refrain

from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax." (McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra, at 45, 110 L Ed 2d at 41; emphasis supplied.)

Additionally, in Reich v. Collins, 513 US ___, 130 L Ed 2d 454, the Supreme Court stated that a state may constitutionally maintain an exclusively post-deprivation (i.e., refund) remedial scheme, so long as the state does not "reconfigure its scheme, unfairly, in mid-course" (130 L Ed 2d at 459).

H. Clearly, the three-year statute of limitations at issue herein falls well within the parameters of constitutionally permissible procedural protections discussed in McKesson and Reich v. Collins. Accordingly, the relevant limitations period is properly applied in this case, and as applied renders petitioners' claims for refund for 1987 and 1988 untimely.

I. Apart from the due process analysis utilized in the McKesson and Davis line of cases, the Appellate Division has indicated that the limitations provisions of Tax Law § 687(a) operate to bar refund claims filed beyond the statutory period even where, as here, the tax in question is subsequently determined to be unconstitutional (see, Fiduciary Trust Co. v. State Tax Commn., supra, 120 AD2d 848, 502 NYS2d 119). The Court in Fiduciary Trust Co. relied on the principle that there can be no recovery of taxes voluntarily paid, without timely protest, under a mistake of law (id., 502 NYS2d at 120). Fiduciary Trust Co. thus provides additional authority against petitioners' position herein.

J. In a letter filed in opposition to the Division's motion petitioners asserted that the statement in the November 20, 1989 Notice of Disallowance indicating that "New York State will not issue refunds for taxes paid on federal pension benefits for years prior to 1989" caused them to fail to timely file refund claims for the years at issue. Although not articulated as such, petitioners' contention amounts to an argument that the Division should be estopped from asserting the statute of limitations to deny petitioners' refund claims. Even assuming that

petitioners have established that the statement quoted above caused their failure to timely file their refund claims¹, any assertion of estoppel herein must fail for the simple reason that the November 20, 1989 Notice of Disallowance contains no misrepresentations. A concealment or false misrepresentation is a necessary element of an estoppel claim (see, Griesmer v. Bourst, 141 AD2d 919, 529 NYS2d 232, 233). The Notice of Disallowance accurately advised petitioners that the Davis decision did not address the issue of retroactivity and the Division's position that it would not issue refunds for years prior to 1989. That the Division later changed its position does not change the fact that the Notice of Disallowance was accurate when issued. Moreover, petitioners should have been aware of the possibility that both the law and the Division's position might change. It was not reasonable, therefore, for petitioners to fail to timely file refund claims based on the November 20, 1989 Notice.

K. Section 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.9[b][1]) provides that a motion for summary determination shall be granted if the administrative law judge finds that it has been established sufficiently that no material issue of fact exists and that, therefore, the administrative law judge can, as a matter of law, issue a determination in favor of any party.

L. In the instant matter there are no material issues of fact. Accordingly, pursuant to the foregoing discussion and section 3000.9(b)(1) of the Rules, the Division of Taxation is entitled to summary determination in this matter.

¹In both their petition and in their letter filed in opposition to the Division's motion, petitioners alleged that their failure to timely file refund claims for the years at issue was caused by the statement in the Notice of Disallowance. Petitioners presented no proof, such as an affidavit, to substantiate this allegation and thus failed to meet their burden of proof with respect to this point.

M. The petition of David A. Hicks and Joan V. Hicks is denied and the Division of Taxation's denial of petitioners' refund claims for the years 1987 and 1988 is sustained.

DATED: Troy, New York
August 29, 1996

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE